**PUBLIC PROSECUTOR**

**v.**

**CHOO CHING HWA & ANOR.**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
MOHD. JEMURI SERJAN SCJ
[SC CRIMINAL APPLICATION NO. 07-11-90]
3 AUGUST 1990

***CIVIL PROCEDURE:*** *Leave to appeal - Supreme Court not provided with grounds of judgment of Sessions Court nor notes of proceedings of High Court - Determination of question of law of public interest - Procedural requirements - Sections 66(1), (2) Courts of Judicature Act 1964.*

The respondents were jointly charged on 12 counts of criminal breach of trust under s. 409 of the Penal Code. They were acquitted without their defence being called. The appellant appealed to the High Court; the central question being whether dishonesty had been proved before the Sessions Court Judge. The High Court dismissed the appeal; hence the present notice of motion by the appellant for leave under s. 66(1) of the Courts of Judicature Act 1964 (the Act); the main reference being what in law amounts to dishonesty.

The Supreme Court was not provided with the grounds of judgment of the Sessions Court Judge nor the notes of proceedings in the High Court. The appellant's affidavit merely stated that these points were raised and argued before the learned Judge.

**Held:**

**[1]** An applicant for leave under s. 66(1) of the Act must satisfy the Court that the question of law of public interest arose in the course of the appeal and the determination of that question had affected the event of the appeal.

**[2]** The easiest way to satisfy the Court of (1) above is to provide the Court with the written judgment or grounds of decision of the learned Judge. If this is not available at least the certified notes of proceedings should be provided if it is clearly indicated therein that that particular point was in fact raised, determined and had affected the event of the appeal.

**[3]** In an application for leave under s. 66 of the Act, the Court should adopt an attitude of reluctance and be slow in granting leave; this is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s. 66(1) of the Act.

**[4]** If at the time of application of leave under s. 66(2), the written judgment of the appellate Judge or the certified notes of proceedings are not available, the affidavit supporting the notice of motion should, as a matter of procedure, state the unavailability of either document and that it will be filed as soon as it is available to enable the Court to fix the date of hearing of the application.

*[Notice of Motion adjourned to enable appellant to provide the Court with written judgment of Sessions Court or the certified notes of proceedings in the High Court.]*

**Cases referred to:**

*Tan Yin Yen v. Public Prosecutor [1973] 2 MLJ 143*
*A. Ragunathan v. Public Prosecutor [1982] CLJ (Rep) 63*

**Legislation referred to:**
Courts of Judicature Act 1964, s. 66(1)
Penal Code, s. 409

*For the appellant - Stanley Isaacs, DPP*
*For the 1st respondent - Low Hop Bing; M/s. Low Hop Bing & Associates*
*For the 2nd respondent - Jagjit Singh; M/s. Jagjit Singh & Co.*

**JUDGMENT**

**Hashim Yeop Sani CJ:**

In the notice of motion by the public prosecutor for leave under s. 66(1) of the Courts of Judicature Act 1964 (the Act) several questions, five in all, were posed for reference. All the questions originated from the appeal dismissed by the learned Judge in the Kuala Lumpur High Court after hearing arguments on 17 February 1990. The respondents were jointly charged on 12 counts in the Kuala Lumpur Sessions Court for criminal breach of trust under s. 409 of the Penal Code involving various sums of money. The respondents were acquitted by the Sessions Court without their defence being called.

In the affidavit of the learned Deputy Public Prosecutor in support of the notice of motion he stated that arguments were heard by the learned appellate Judge on the central question whether dishonesty had been proved before the learned Sessions Court Judge. According to the learned Deputy Public Prosecutor his submission on this issue was rejected both by the Sessions Court and the High Court. The five questions in respect of which leave was sought for reference all relate to what in law amounts to dishonesty in the context of the case whether dishonesty is said to have been proved once it is proved that the loans were given without authority and that there was a loss to the person giving the loans and/or a gain to the person taking the loans.

Looking at those questions it would seem obvious to us that these are all bare questions, no doubt questions of law but without any evidence, other than the assertion of the learned Deputy Public Prosecutor whether they were in fact questions on which the learned Judge of the High Court decided to determine the appeal. We were not provided with the grounds of judgment of the learned Judge nor the notes of the proceedings in the High Court. The affidavit merely stated that these points were raised and argued before the learned Judge.

The principles on which leave may be granted under s. 66(1) of the Act have been settled. Apart from being a question of law of public interest the other requirements of s. 66(1), are that the question must have arisen in the course of the appeal, and more importantly the determination of the question has affected the event of the appeal. Although s. 66(1) of the Act says that the Court shall on the application of the public prosecutor grant leave, the Court should not just grant leave unless it is satisfied that the question was actually determined by the appellate Judge and has affected the event of the appeal. It is common knowledge that various points may be raised in an appeal and submissions made thereon but it is not unusual that although a number of legal issues were argued and submitted by Counsel the Judge may decide on one obscure point and decide the appeal solely on that point without considering the other issues raised in the appeal before him.

Therefore an applicant for leave under s. 66(1) of the Act must satisfy the Court that the question of law of public interest arose in the course of the appeal and the determination of that question had affected the event of the appeal. The easiest way to satisfy the Court that this particular requirement of s. 66(1) of the Act has been satisfied is to provide the Court

with the written judgment or grounds of decision of the learned Judge or if it is not available to provide at least the certified notes of proceedings if it is clearly indicated therein that that particular point was in fact raised, determined and had affected the event of the appeal.

It hardly needs to be emphasised that in an application for leave under s. 66 of the Act the Court should adopt an attitude of reluctance and be slow in granting leave. This attitude was clearly indicated in *Tan Yin Yen v. Public Prosecutor* [1973] 2 MLJ 143 and *A. Ragunathan v. Public Prosecutor* [1982] CLJ (Rep) 63. The basis for this attitude is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s. 66(1) of the Act.

For the above reasons the notice of motion was adjourned to another date to be fixed by the Senior Assistant Registrar to enable the applicant to provide the Court with a written judgment of the learned appellate Judge or if it is not available, the certified notes of proceedings to indicate that the questions raised were actually determined and had affected the event of the appeal.

Under sub-section (2) of s. 66 the application for leave shall be made within one month or such longer time as the Supreme Court may permit of the determination of the appeal to which it relates. In order to comply with this provision, the application for leave must be filed within one month or such longer period as the Court may allow. However, if at the time of application the written judgment of the appellate Judge or the certified notes of proceedings are not available, the affidavit supporting the notice of motion should, as a matter of procedure, state the unavailability of either document and that it will be filed as soon as it is available to enable the Court to fix the date of hearing of the application.

Also found at [1990] 2 CLJ 748